No. 86-1834

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FRANK J. BROWN,
Petitioner,

v.

ALABAMA DEPARTMENT OF PENSIONS AND SECURITY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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38 pp

QUESTIONS PRESENTED FOR REVIEW

1. HAS PETITIONER PRESENTED ANY REASON UNDER RULE 17 TO JUSTIFY THIS COURT GRANTING CERTIORARI?

2. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DISMISSING PETITIONER'S CASES?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ...	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
i. COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW.	2
ii. STATEMENT OF THE FACTS	4
SUMMARY OF ARGUMENT	7
ARGUMENT	7
I. PETITIONER HAS NOT PRESENTED ANY REASONS UNDER SUPREME COURT RULE 17 TO JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT	7
II. CONTENTIONS NOT RAISED IN THE COURT OF APPEALS AND NOT ADDRESSED BY THAT COURT ARE NOT TO BE CONSIDERED BY THIS COURT	10
III. THE QUESTION FOR REVIEW BEFORE THIS COURT IS TO DETERMINE WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING MR. BROWN'S ORIGINAL SUIT	11

IV. THE PETITION FOR WRIT OF CERTIORARI WAS UNTIMELY FILED 11

CONCLUSION 12

PROOF OF MAILING AFFIDAVIT 13

PROOF OF SERVICE 15

APPENDIX:

APPENDIX A—OPINION OF COURT OF APPEALS 1a

APPENDIX B—JUDGMENT OF COURT OF APPEALS 4a

APPENDIX C—ORDER OF COURT OF APPEALS 6a

APPENDIX D—ORDER OF DISTRICT COURT 8a

APPENDIX E—ORDER OF DISTRICT COURT 10a

APPENDIX F—ORDER OF DISTRICT COURT 12a

APPENDIX G—ORDER OF DISTRICT COURT 13a

APPENDIX H-ORDER OF APPEALS COURT 14a

TABLE OF AUTHORITIES

Case	**Page**
E.E.O.C. v. Federal Labor Relations Authority, 106 S.Ct. 1678, 90 L.Ed.2d 19	10
FTC v. Grolier, Inc., 462 U.S. 19, 23, 106 S.Ct. 2209, 2212, 76 L.Ed. 2d 387 (1983)	10
Fornaris v. Ridge Tool Co., 400 U.S. 41, 91 S.Ct. 156 27 L.Ed.2d 174 (1970)	9
Maine v. Taylor, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986)	9
National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 96 S.Ct. 2778, 49 L.ED.2d 747, *rehearsing denied*, 429 U.S. 874, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976)	11
Perry Education Assn. v. Perry Local Educator's Assn., 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)	9
Rogers v. Lodge, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012, *rehearsing denied*, 459 U.S. 899, 103 S.Ct. 198, 74 L.Ed.2d 160 (1982)	10
Silkwood v. Kerr-McGee Corp., 462 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984)	9
Tennessee v. Dunlap, 426 U.S. 312, 96 S.Ct. 2099, 48 L.Ed.2d 660 (1976)	10
Constitution and Statutes	
28 U.S.C. §1254	2, 9
28 U.S.C. §2101(c)	11
Other Authorities	
Rule 56, F.R.Civ.P	2

Rule 60(b) F.R.Civ.P 3, 10

Rule 17 of the Rules of the Supreme Court 7, 8

Rule 33 of the Rules of the Supreme Court 12

Rule 21 of the Rules of the Supreme Court 12

Rule 46 of the Rules of the Supreme Court 12

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

FRANK J. BROWN,
Petitioner,

v.

ALABAMA DEPARTMENT OF
PENSIONS AND SECURITY, *et al.*,
Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

OPINIONS BELOW

The opinion of the Court of Appeals affirming the judgment of the district court is unpublished. The opinion and judgment were rendered on December 31, 1986. The opinion and judgment of the Court of Appeals are attached hereto as Appendices A and B, respectively.

The petition for rehearing in the Court of Appeals filed by Mr. Brown was denied by the Eleventh Circuit Court of Appeals on January 30, 1987. A copy of the judgment is attached as Appendix C.

The opinions and judgments of the district court are attached hereto as Appendices D and E, respectively. The orders of the district court denying Mr. Brown leave to appeal *in forma pauperis* are attached hereto as

Appendices F and G, respectively. The order of the Eleventh Circuit Court of Appeals denying Mr. Brown's motion to appeal *in forma pauperis* is found at Appendix H.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1987 (see Appendix E). The petition for rehearing was denied on January 30, 1987 (see Appendix C). This Petition for a Writ of Certiorari was not filed within ninety days after that date. This Court's jurisdiction therefore has not been properly invoked under 28 U.S.C. §1254(c).

STATEMENT OF THE CASE

i. Course of Proceedings and Dispositions in the Court Below

This action was commenced by Petitioner, Frank Brown, filing his complaint on August 27, 1984 against the Respondent Dekalb County Department of Pensions and Security in the United States District Court for the Northern District of Alabama, Middle Division. Said Respondent filed a Motion to Dismiss and said motion was construed by the court as a motion for summary judgment pursuant to Rule 56, F.R.Civ.P. On April 11, 1985, Judge William M. Acker, Jr., issued an *ORDER* overruling the Department's summary judgment motion and stating further that the ruling was without prejudice to the Department's filing another Rule 56 motion if and when it could provide undisputed verification of the date upon which Brown received his right-to-sue letter and if the date was more than ninety days prior to August 27, 1984.

The Department filed an Answer with Affirmative Defense on May 1, 1985. Judge Acker issued an *ORDER*

on July 3, 1985, stating that the pre-trial conference scheduled for July 1, 1985 was not held because Petitioner Brown failed to present or bring a proposed pre-trial order to the pre-trial conference scheduled on July 1, 1985. The court rescheduled the pre-trial conference to August 9, 1985.

The Department issued a Notice of Taking Deposition to the *pro se* Plaintiff on July 3, 1985. The Department filed a motion for summary judgment, amended answer and motion to dismiss or in the alternative for sanction; and, memorandum brief requested by the court on August 2, 1985. Judge Acker issued an order on August 5, 1985 stating that the Department's motion would be taken under submission by the court, without oral argument.

On August 12, 1985, Judge Acker entered an *ORDER OF DISMISSAL.* Petitioner filed a Rule 60(b) motion on March 11, 1986 which was denied by Judge Acker on March 13, 1986. Petitioner filed a Notice of Appeal of his Rule 60(b) motion on March 17, 1986.

In the second case that is the subject of this appeal and which has been consolidated with the original case, Petitoner filed his complaint on September 13, 1985, one month after the first complaint was dismissed. This complaint was against the State of Alabama Department of Pensions and Security, DeKalb County Department of Pensions and Security, Larry Dupree, Director DeKalb County Department of Pensions and Security, Bernice Parker, former Director Dekalb County Department of Pensions and Security, et. al. Mr. Brown filed an Amended Complaint on November 5, 1985. On February 12, 1986, Judge U. W. Clemon issued an *ORDER OF DISMISSAL,* dismissing Petitioner's action on the ground that it was barred by a prior adjudication on the merits which bars further adjudication on the same cause of action. Mr. Brown filed a Notice of Appeal to the

Eleventh Circuit on March 11, 1986. On March 19, 1986, Judge U. W. Clemon issued an *ORDER* denying Petitioner's motion to prosecute an appeal *in forma pauperis.* A copy of this order is found at Appendix F. On March 24, 1986 United States District Judge, William M. Acker, Jr., denied Petitioner's motion for leave to appeal *in forma pauperis.* A copy of this order is attached as Appendix G. The Eleventh Circuit denied Mr. Brown's motion to appeal *in forma pauperis.* A copy of that order is attached as Appendix H.

The Eleventh Circuit Court of Appeals affirmed the lower Court's ruling in an unpublished decision on December 31, 1986. A copy of this decision is attached as Appendix A. The petition for rehearing was denied by the Court of Appeals on January 30, 1987. A copy of this order is attached as Appendix C.

ii. Statement of the Facts

Plaintiff was employed by the Dekalb County Department of Pensions and Security (hereinafter DCDPS)[1] on February 24, 1969 as a Social Worker. On September 13, 1982, Mr. Brown was terminated because of his failure to perform his duties as an adult service worker in the Dekalb County Adult Service Program. On August 25, 1982, Mr. Brown filed a civil rights complaint against the DCDPS alleging discrimination on the basis of handicap. The Office for Civil Rights determined that Mr. Brown did not meet the definition of a "qualified handicapped person" and was, therefore, not entitled to protection under Section 504 of the Rehabilitation Act of 1973. This decision was made in September, 1984.

[1]The Department is now known as the Department of Human Resources. The name was changed by the Alabama Legislature on April 29, 1986, Act No. 86-432.

Mr. Brown also filed a charge of sex discrimination against the DCDPS with the Equal Employment Opportunity Commission in May, 1982. In July 1983, the Petitioner filed a charge of retaliation and age discrimination with the Equal Employment Opportunity Commission (EEOC). A right-to-sue letter was issued in January 1983 stating:

> You failed to provide requested necessary information, failed or refused to appear to be available for necessary interviews/conferences or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You have had more than thirty days in which to respond to our final written request.

Mr. Brown filed his complaint in the United States District Court for the Northern District of Alabama, Middle Division, on August 27, 1984. Mr. Brown alleged he was fired in retaliation for filing charges of sex and age discrimination with the EEOC. The District Court dismissed Mr. Brown's complaint for failing to present a proposed pre-trial order at the first pre-trial conference; for failing to appear at the rescheduled pre-trial conference; and for refusing to appear for depositions scheduled by the Department.

The District Court stated:

> On August 9, 1985, Plaintiff failed to appear for the rescheduled pre-trial conference and has not communicated in any way with the court or with defendants' counsel.
>
> The court has leaned over backwards to accommodate plaintiff's *pro se* status and has given plaintiff every opportunity to prosecute

> his action. Perhaps for good cause plaintiff has chosen to abandon his action, and there is no viable alternative under the circumstances except dismissal.

The Order of Dismissal was entered on August 12, 1985.

On September 13, 1985, Mr. Brown filed a complaint that was simply the same complaint as that of the previous action. The complaint had the civil action number CV-84-AR-2210-M marked out in pen. The same Defendants were named. Mr. Brown filed an amended complaint on November 5, 1985, which did not state any new allegations. Mr. Brown again alleged his termination was retaliatory for his having filed sex and age discrimination charges.

The District Court dismissed the cause on the grounds that the order of dismissal in *Frank J. Brown v. Dekalb County Department of Pensions and Security*, CV-84-AR-2210-M, constituted an adjudication on the merits which barred further adjudication on the same cause of action. The District Court found:

> There is no question that the present action involves the same cause of action as the dismissed case since the plaintiff literally filed the same complaint in both actions. The plaintiff simply crossed out the docket number from the first case and then re-filed the complaint.

The Eleventh Circuit Court of Appeals affirmed the lower Court's dismissal of the cases and stated:

> Dealing first with the appeal from the denial of the Rule 60(b) motion, we note that such are directed to the sound discretion of the district court. *Griffin v. Swim-Tech Corp.*,

722 F.2d 677, 680 (11th Cir. 1984). Although dismissal for failure to obey court ordered discovery is a sanction of last resort, a district court does not abuse its discretion in denying such a motion when the underlying dismissal has been for failure to comply with court ordered discovery, compliance was not beyond the party's control, and non-compliance demonstrated a lack of good faith. *Phillips v. Insurance Co. of North America*, 633 F.2d 1165, 1167 (5th Cir. 1981). We find just such a situation here. Although proceeding *pro se*, Brown clearly had the ability to comply with the Court's orders. There was no abuse of discretion.

The filing of the second lawsuit and the use of what appears to be a photocopy of the first complaint is clearly improper. The dismissal of the first suit, which was never the subject of a direct appeal, operates as an adjudication on the merits. The final judgment entered in that matter bars further claims based upon the same cause of action. *Brown v. Felson*, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979). The dismissal of the second suit on grounds of *res judicata* was proper.

SUMMARY OF ARGUMENT

Petitioner has not presented any reasons under Rule 17 to justify the granting of the Writ. Petitioner has presented new contentions not raised in the District Court or the Court of Appeals. These contentions should not be considered by this Court on certiorari.

ARGUMENT

I. PETITIONER HAS NOT PRESENTED ANY REASONS UNDER SUPREME COURT

RULE 17 TO JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

Supreme Court Rule 17.1 provides as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling, nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of

> federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioner has written a broad and vague petition which fails to fully address any of the reasons for granting a Writ of Certiorari outlined in the above Rule.

In this case there is no state statute that has been struck down by a Federal Court of Appeals. 28 U.S.C. §1254 provides that, "this Court is empowered to review the decision of a Federal Court of Appeals by appeal if a State Statute is held by the Court of Appeals to be invalid as repugnant to the Constitution." This Court has consistently stated that statutes authorizing appeals are to be strictly construed. *Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 43, 103 S.Ct. 948, 953, 74 L.Ed.2d 794 (1983); *Fornaris v. Ridge Tool Company*, 400 U.S. 41, 91 S.Ct. 156, 27 L.Ed.2d 174 (1970); *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed. 2d 443 (1984). This case does not come within the scope of jurisdictional grant of 28 U.S.C. §1254. The decision below, accordingly, is not reviewable by a writ of certiorari. Statutes authorizing appeals as of right to the Supreme Court are strictly construed. *Maine v. Taylor*, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986).

Petitioner has filed a petition which does not address any of the issues required for granting certiorari. In fact, Mr. Brown's Petition for certiorari fails to address any of the jurisdictional requirements for reasons for granting review by this Court. Mr. Brown presents this Court with a petition containing vague and inconclusive statements addressing a wide range of complaints. These allegations were adequately addressed in review by the District Court and Court of Appeals below.

II. CONTENTIONS NOT RAISED IN THE COURT OF APPEALS AND NOT ADDRESSED BY THAT COURT ARE NOT TO BE CONSIDERED BY THIS COURT.

Claims not included in the complaint and not considered by the District Court or the Court of Appeals are not before the Supreme Court on certiorari. *Tennessee v. Dunlap*, 426 U.S. 312, 96 S.Ct. 2099, 48 L.Ed.2d. 660 (1976). Contentions that are not raised in the Court of Appeals and not addressed by that Court are not considered by this Court. *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d. 1012, *rehearing denied*, 459 U.S. 899, 103 S.Ct. 198, 74 L.Ed.2d. 160 (1982). The issues presented for review by the Eleventh Circuit Court of Appeals are whether or not the District Court erred in denying Mr. Brown's Rule 60(b) motion and whether the District Court errred in denying Mr. Brown's Rule 60(b) motion without a hearing. Those issues were stated by Mr. Brown in his Brief to the Eleventh Circuit Court. In his Petition for a Writ of Certiorari, Mr. Brown presents five (5) new and novel issues that have never been presented in the District Court or to the Eleventh Circuit Court of Appeals. However, Mr. Brown had an ample and adequate opportunity to present these issues to both of those forums. The issues that Mr. Brown presents are neither on point and pertinent, nor are they relevant to this case.

This Court has declared that it will not address issues that have not been raised in the Court of Appeals. *E.E.O.C. v. Federal Labor Relations Authority*, 106 S.Ct. 1678, 90 L.Ed.2d 19; *see, e.g., F.T.C. v. Grolier, Inc.*, 462 U.S. 19, 23, 106 S.Ct. 2209, 2212, 76 L.Ed. 2d 387 (1983); *Rogers v. Lodge*, 458 U.S. 613, 628, 102 S.Ct. 3272, 3281, 73 L.Ed.2d 1012 (1982). Mr. Brown originally filed suit based upon alleged discriminatory employment practices. The original complaint was filed in the District Court on August 27, 1984. On August 12, 1985, that suit

was dismissed because Mr. Brown failed to comply with Court ordered pretrial procedures. Months later, after a Rule 60(b) motion was denied, Mr. Brown filed an identical copy of his original complaint as a new action. This action was dismissed as *res judicata.* The dismissal of the first suit, which was never the subject of a direct appeal, operates as an adjudication on the merits. Mr. Brown had an opportunity in both cases below to pursue any legitimate claims that he may have had.

III. THE QUESTION FOR REVIEW BEFORE THIS COURT IS TO DETERMINE WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING MR. BROWN'S ORIGINAL SUIT.

This court has consistently held that petitions for certiorari are to be viewed in the light of abuse of discretion by the District Court. *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747, *rehearing denied,* 429 U.S. 874, 97 S.Ct. 197, 50 L.Ed.2d. 158 (1976).

IV. THE PETITION FOR WRIT OF CERTIORARI WAS UNTIMELY FILED.

Mr. Brown's Petition for Writ of Certiorari was not filed within the ninety day time period required after entry of judgment or decree. 28 U.S.C. §2101(c) requires that a writ of certiorari must be applied for within ninety days after the entry of judgment or decree. The judgment was entered by the Eleventh Circuit Court of Appeals on December 31, 1986. The Petition for rehearing was denied by the Eleventh Circuit Court of Appeals on January 30, 1987. The Petition was not properly filed according to the rules of this Court.

Petitioner failed to timely file a corrected copy of his petition within ninety days after the date of denial of rehearing by the Court of Appeals. The Petition for Writ

of Certiorari fails to comply with Rule 33 of the Supreme Court Rules. The Petition has not been produced on paper that is 6⅛ by 9¼ inches in size. The Petition also fails to comply with Rule 21 of the Supreme Court Rules in that the Petition does not contain the proper documents. Petitioner has not paid the required docket fee. Petitioner failed to present a motion for leave to appeal *in forma pauperis* pursuant to Rule 46 of the Supreme Court Rules.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

SHARON E. FICQUETTE*
WILLIAM PRENDERGAST
Assistant Attorneys General
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No. 86-1834

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

FRANK J. BROWN,

Petitioner,

v.

ALABAMA DEPARTMENT OF PENSIONS AND SECURITY, *et al.*,

Respondents.

PROOF OF MAILING AFFIDAVIT

I, Sharon E. Ficquette, Attorney of Record for the Alabama Department of Human Resources, Respondents herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that, on the 15th day of July, 1987, I deposited in a United States mailbox located at 100 Commerce Street, Montgomery, Alabama, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing the foregoing RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Sharon E. Ficquette

Sharon E. Ficquette

SWORN TO AND SUBSCRIBED before me, at

Montgomery, Alabama, this the 15th day of July, 1987.

Sheila E. Berry

NOTARY PUBLIC

MY COMMISSION EXPIRES:

4/18/90

No. 86-1834

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

FRANK J. BROWN,

Petitioner,

v.

ALABAMA DEPARTMENT OF PENSIONS AND SECURITY, *et al.*,

Respondents.

PROOF OF SERVICE

I, Sharon E. Ficquette, Attorney of Record for the Alabama Department of Human Resources, Respondents herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that, on the 15th day of July, 1987, I served a copy of the foregoing RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on all parties required to be served as follows: on Petitioner herein, by depositing a copy in the United States mail, with first-class postage prepaid, addressed to:

To Mr. Frank J. Brown
P.O. Box 222
Fort Payne, Alabama 35967

Sharon E. Ficquette

Sharon E. Ficquette
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ALABAMA DEPARTMENT OF
PENSIONS AND SECURITY, *et al.*,
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**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

APPENDIX

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*Counsel of Record

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7175
Non-Argument Calendar*

FRANK BROWN,
Plaintiff-Appellant,

versus

STATE OF ALABAMA DEPARTMENT OF PENSIONS AND SECURITY AND DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY, AND MR. LARRY DUPREE, DIRECTOR, AND MRS. BERNICE PARKER, FORMER DIRECTOR, et al.,
Defendants-Appellees.

No. 86-7200
Non-Argument Calendar*

FRANK BROWN,
Plaintiff-Appellant,

versus

DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY,
Defendant-Appellee.

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*Fed. R. App. P. 34(a); 11th Cir. R. 23.

Appeals from the United States District Court
for the Northern District of Alabama

(December 31, 1986)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

Brown filed suit based upon alleged discriminatory employment practices. The original complaint was filed on August 27, 1984. On August 12, 1985 that suit was dismissed because Brown had failed to file his pre-trial papers, failed to appear for his deposition and failed to comply with other court ordered pre-trial procedures. Months later, on March 11, 1986, Brown filed a Rule 60(b) motion seeking relief from the dismissal. This request was denied and that ruling gives rise to the first appeal.

Subsequently, Brown filed an identical copy of his original complaint as a new action. This was done on September 13, 1985. Following the filing of a motion to dismiss, this action was dismissed as *res judicata*. This ruling is the basis of the second apeal.

Dealing first with the appeal from the denial of the Rule 60(b) motion, we note that such are directed to the sound discretion of the district court. *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984). Although dismissal for failure to obey court ordered discovery is a sanction of last resort, a district court does not abuse its discretion in denying such a motion when the underlying dismissal has been for failure to comply with court ordered discovery, compliance was not beyond the party's control, and noncompliance demonstrated a lack of good faith. *Phillips*

v. Insurance Co. of North America, 633 F.2d 1165, 1167 (5th Cir. 1981).[1] We find just such a situation here. Although proceeding *pro se*, Brown clearly had the ability to comply with the court's orders. There was not abuse of discretion.

The filing of the second lawsuit and the use of what appears to be a photocopy of the first complaint is clearly improper. The dismissal of the first suit, which was never the subject of a direct appeal, operates as an adjudication on the merits. The final judgment entered in that matter bars further claims based upon the same cause of action. *Brown v. Felson*, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979). The dismissal of the second suit on grounds of *res judicata* was proper.

AFFIRMED.

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[1]The Eleventh Circuit, in *Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7175
Non-Argument Calendar

D.C. Docket No. 85-2449

FRANK BROWN,
Plaintiff-Appellant,

versus

STATE OF ALABAMA DEPARTMENT OF PENSIONS AND SECURITY AND DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY, AND MR. LARRY DUPREE, DIRECTOR, AND MRS. BERNICE PARKER, FORMER DIRECTOR, et al.,
Defendants-Appellees.

No. 86-7200
Non-Argument Calendar

D.C. Docket No. 84-2210

FRANK BROWN,
Plaintiff-Appellant,

versus

DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY,
Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Alabama

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and were taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of the said District Court in these causes be and the same are hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 31, 1986

For the Court: Miguel J. Cortgez, Clerk

By: /s/David Malaud
Deputy Clerk

ISSUED AS MANDATE: Feb. 10, 1987

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7175

FRANK BROWN,
Plaintiff-Appellant,

versus

STATE OF ALABAMA DEPARTMENT OF PENSIONS AND SECURITY AND DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY, et al.,
Defendants-Appellees.

No. 86-7200

FRANK BROWN,
Plaintiff-Appellant,

versus

DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(Filed January 30, 1987)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

ON PETITION(S) FOR REHEARING

(January 30, 1987)

BEFORE: FAY, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, FRANK BROWN, is *denied.*

ENTERED FOR THE COURT:

/s/Peter T. Fay
United States Circuit Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

Civil Action No. 86-AR-2210-M

FRANK BROWN,
Plaintiff,

VS.

DEKALB COUNTY DEPARTMENT OF PENSIONS & SECURITY,
Defendant.

(Filed August 12, 1985)

ORDER OF DISMISSAL

This case is in the following posture.

It is set for trial on September 9, 1985.

Plaintiff, Frank Brown, who is *pro se*, failed to present a proposed pre-trial order at the pre-trial conference held on July 1, 1985. At that conference the court clearly explained to plaintiff that a form to be used for preparing a pre-trial order had been mailed to him with the order setting the pre-trial conference, and that a plaintiff is required to present the initial draft of a pre-trial order and to submit it first to the defendant and then to the court. The court then rescheduled the pre-trial conference for August 9, 1985.

On July 1, 1985, plaintiff was also informed by defendant (and the court concurred) that there is no legal entity entitled "DeKalb County Department of Pensions & Security", and that plaintiff's complaint

should be amended properly to name the defendant.

As was made apparent to plaintiff from the ruling on defendant's earlier motion for summary judgment, a crucial factual issue is the date upon which plaintiff actually received his right-to-sue letter in light of the fact that the EEOC destroyed its records of the transaction. Defendant has given notice to plaintiff on several occasions to depose plaintiff, but plaintiff has failed and refused to appear for deposition. Defendant has refiled a motion for summary judgment and has filed a motion to dismiss because of plaintiff's failure to appear for deposition.

On August 9, 1985, plaintiff failed to appear for the re-scheduled pre-trial conference and has not communicated in any way with the court or with defendant's counsel.

The court has leaned over backwards to accomodate(sic) to plaintiff's *pro se* status and has given plaintiff every opportunity to prosecute his action. Perhaps for good cause plaintiff has chosen to abandon his action, and there is no viable alternative under the circumstances except dismissal.

For good cause shown, of the court's own motion, the action is DISMISSED for want of prosecution.

Costs are taxed against plaintiff.

DONE this 12th day of August, 1985.

/s/William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CIVIL ACTION NUMBER
85-C-2449-M

FRANK BROWN,
Plaintiff,

VS.

STATE OF ALABAMA DEPARTMENT OF
PENSIONS AND SECURITY, et al.,
Defendants.

(Filed Feb. 12, 1986)

ORDER OF DISMISSAL

This cause came to be heard upon defendant's motion to dismiss the above styled action on the ground that it is barred by a prior adjudication on the merits with respect to the same cause of action.

On August 27, 1986, the plaintiff filed an action in this court styled *Frank J. Brown v. Deklab County Department of Pensions and Security*, CV 84-AR-2210-M. In an order entered on August 12, 1985, United States District Judge William M. Acker, Jr., dismissed the action for lack of prosecution. Pursuant to Fed.R.Civ.P. 41(b), said order of dismissal constitutes an adjudication on the merits which bars further adjudication on the same cause of action. See *Bierman v. Tampa Electric Co.*, 604 F.2d 929 (5th Cir. 1979).

There is no question that the present action involves the

same cause of action as the dismissed case since the plaintiff literally filed the same complaint in both actions. The plaintiff simply crossed out the docket number from the first case and then refiled the complaint.

Accordingly, the case must be dismissed. It is therefore ORDERED, ADJUDGED and DECREED that the above styled case is DISMISSED with prejudice, and that the plaintiff shall bear the costs of this action.

DONE this 12th day of February, 1986.

/s/U.W. Clemon
UNITED STATES DISTRICT JUDGE
U.W. Clemon

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CIVIL ACTION NUMBER

85-C-2449-M

FRANK BROWN,

Plaintiff,

VS.

STATE OF ALABAMA DEPARTMENT OF PENSIONS AND SECURITY, et al.,

Defendants.

(Filed Mar. 19, 1986)

ORDER

Upon consideration of the plaintiff's motion to prosecute an appeal *in forma pauperis*, the Court finds that said appeal is frivolous and not taken in good faith. Accordingly, it is

ORDERED that plaintiff's motion is DENIED, and the Court certifies, pursuant to 28 U.S.C. § 1915(a), that said appeal is not taken in good faith.

DONE this 19th day of March, 1986.

/s/U.W. Clemon
UNITED STATES DISTRICT JUDGE
U.W. Clemon

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

CIVIL ACTION NO. 84-AR-2210-M

FRANK BROWN,
Plaintiff,

VS.

DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY,
Defendant.

(Filed March 24, 1986)

ORDER

The Clerk has brought to the attention of the court a purported notice of appeal filed by Frank J. Brown on March 17, 1986. The said purported notice of appeal was unaccompanied by the appropriate filing fee and unaccompanied by a motion for leave to appeal *in forma pauperis*. Nevertheless, the court will deem plaintiff, who appears *pro se*, as having filed a petition for leave to appeal *in forma pauperis*. Because the purported appeal is frivolous and without colorable merit, the court DENIES plaintiff the right to appeal *in forma pauperis*.

DONE this 21st day of March, 1986.

/s/William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7175

CV-85-C2449-M

FRANK BROWN,
Plaintiff-Appellant,

verus

STATE OF ALABAMA DEPARTMENT OF PENSIONS AND SECURITY AND DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY, AND MR. LARRY DUPREE, DIRECTOR, AND MRS. BERNICE PARKER, FORMER DIRECTOR, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

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(Filed June 4, 1986, 11th Cir.)
(Filed June 6, 1986, U.S. District Court)

ORDER:

IT IS ORDERED that appellant's motion to appeal *in forma pauperis* is DENIED. There has been no attempt to show qualification for IFP status.

IT IS FURTHER ORDERED that appellant's motion for consolidation of No. 86-7175 and No. 86-7200 is GRANTED.

/s/PETER T. FAY
UNITED STATES CIRCUIT JUDGE